

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LORENZO ANTHONY,

Defendant-Appellant.

UNPUBLISHED

November 20, 2008

No. 278577

Wayne Circuit Court

LC No. 06-014189-01

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit murder, MCL 750.83. He was sentenced as a fourth habitual offender, MCL 769.12, to 60 to 90 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise out of an altercation involving Eddie Brown. Defendant lived with his girlfriend, Kim Martin, and her children at a residence rented from Brown in the city of Detroit. On November 21, 2004, Brown was cleaning the house after having evicted Martin when Martin stopped her vehicle in front of the residence. Defendant, Martin's two children, and a pit bull were inside the vehicle with Martin. The dog jumped out of the vehicle and began chasing Brown, who was standing in the driveway. Martin and defendant then got out of the vehicle and chased Brown along with the dog. Martin struck Brown with a crowbar that she was carrying, and he fell to the ground. He was unable to remember what occurred thereafter. Witnesses observed defendant stab Brown in the back with a knife as he was falling. Brown sustained a spinal cord injury that rendered him unable to walk again. Martin was convicted of assault with intent to do great bodily harm less than murder for her role in the incident.

Defendant first argues that the trial court's failure to admit as substantive evidence Kenneth Homesly's testimony at Martin's trial denied him due process and a fair opportunity to present his defense of mistaken identity. Because defendant failed to preserve this issue for appellate review by seeking to admit Homesly's previous testimony as substantive evidence, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

Defendant argues that Homesly's previous testimony should have been admitted as substantive evidence under MRE 801(d)(1)(A) rather than as mere impeachment evidence. MRE 801(d)(1)(A) provides:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if—

(1) *Prior Statement of Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition

Homesly's previous testimony clearly satisfies the requisites of MRE 801(d)(1)(A) and therefore would have been admissible under that rule. It appears from the record, however, that defense counsel sought to admit Homesly's previous testimony only for impeachment purposes. Evidence used only for impeachment purposes is not substantively admissible. *Barnett v Hidalgo*, 478 Mich 151, 164; 732 NW2d 472 (2007). Regardless of the purpose for which defense counsel sought to admit the evidence, however, the record shows that the trial court permitted the jury to consider it as substantive evidence. The court instructed that "if the earlier inconsistent statement was given under oath subject to the penalty of perjury at a trial or hearing, it may be considered as proof of the facts in the statement." Therefore, the record shows that the trial court allowed the jury to consider Homesly's previous testimony as substantive evidence. Accordingly, defendant has failed to establish plain error.

Defendant also contends that the trial court erroneously refused to allow the jury to review the transcript of Homesly's testimony at Martin's trial. We review for an abuse of discretion a trial court's decision whether to grant a jury's request to review certain testimony. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). An abuse of discretion occurs when a decision falls outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006), lv den 478 Mich 853 (2007).

The trial court did not abuse its discretion by denying the jury's request to review portions of Homesly's testimony at Martin's trial. The jury's note stated, "We need transcript from Kim Martin trial, pages 42/45." Both parties acknowledged that the transcript itself was not admitted as evidence. "A trial court is not to provide the jury with unadmitted evidence." *Davis*, *supra* at 57. In *Davis*, the jury asked to review statements that a witness made at the defendant's preliminary examination. Although the preliminary examination transcript had not been admitted as evidence, portions of the witness's preliminary examination testimony had been read into the record during the witness's cross-examination at trial. *Id.* at 56-57. This Court held that the trial court properly instructed the jury that the preliminary examination transcript had not been admitted into evidence and that the jury should rely on its memory. *Id.* at 57. This Court further noted that the trial court's response did not foreclose the possibility of having the witness's testimony reread at a later time. *Id.*

Similarly, in the instant case, the transcript of Homesly's previous testimony was not admitted as evidence. The trial court instructed the jury as such and directed the jurors to rely on their memories. The court's instruction did not foreclose the possibility that Homesly's previous testimony could be reread at a later time, and in fact the trial court stated that it would consider

rereading the testimony if the jury so requested. The trial court did not abuse its discretion by responding as such to the jury's request.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel refused to cross-examine Alvin Smith. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, and this Court denied his motion to remand to move for an evidentiary hearing, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302.

Defendant argues that trial counsel rendered ineffective assistance by refusing to cross-examine Smith.¹ Defendant contends that cross-examination would have revealed that even though Smith told the police that “Mike” lived with Martin next door to his house, he did not inform the police that he knew the man who was with Martin when the assault occurred. Defendant further contends that cross-examination would have revealed inconsistencies between defendant's physical appearance and Smith's description of the perpetrator.

Defendant has failed to establish that counsel's refusal to question Smith prejudiced him considering other witnesses' identifications of defendant as the perpetrator. Brown testified that Martin, defendant, and their pit bull chased him immediately before Martin struck him with a crowbar and he blacked out. Homesly identified defendant as the person who stabbed Brown with a knife. Homesly pulled defendant off Brown and exchanged words with him before defendant ran back across the street and reentered Martin's vehicle. Lavita Dorsey also witnessed the stabbing, identified defendant as the perpetrator, and testified that she had seen defendant on a daily basis before the incident. Smith, however, did not witness the stabbing. Rather, he testified that he saw defendant and Martin running toward a car while Brown was lying on the ground. He maintained that defendant lived next door to him for approximately one year before the incident. (Tr II, 211-214.) Further, during defense counsel's cross-examination of Sergeant Avis Taylor, counsel elicited that Smith's description of the perpetrator differed from

¹ Defense counsel refused to cross-examine Smith after the trial court admonished counsel for becoming argumentative with Smith. The trial court directed counsel to ask questions in a civilized manner and lower his voice. Thereafter, counsel became obstinate and refused to agree to conduct his cross-examination in a civilized manner. The trial court then dismissed Smith, and counsel did not recall him despite having reserved the right to do so.

the descriptions that other witnesses provided. Therefore, we cannot conclude that counsel's failure to cross-examine Smith prejudiced defendant. Defendant has failed to demonstrate a reasonable probability that, but for counsel's failure, the result of the proceeding would have been different. *Toma, supra* at 302-303.

Defendant next argues that he is entitled to resentencing because the trial court erroneously scored 25 points for offense variable 13. Defendant argues that his 60-year minimum sentence constitutes an upward departure under the properly scored sentencing guidelines. Because defendant specifically agreed with the guidelines scoring in the trial court and affirmatively asserted that they were correctly scored, he has waived appellate review of this issue. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000), reh den 463 Mich 1210 (2000). Defendant's waiver extinguished any error. *Id.* at 216.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski